

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

THE STATE OF WASHINGTON,

Plaintiff,
v.

THE GEO GROUP, INC.,

Defendant.

CASE NO. 3:17-cv-05806-RJB

ORDER GRANTING PLAINTIFF
THE STATE OF WASHINGTON'S
MOTION FOR PROTECTIVE
ORDER QUASHING SUBPOENA
FOR DEPOSITION OF ATTORNEY
GENERAL ROBERT W.
FERGUSON

THIS MATTER comes on Plaintiff the State of Washington's Motion for Protective Order Quashing Subpoena for Deposition of Attorney General Robert W. Ferguson. Dkt. 100. The Court has considered the motion, Defendant The GEO Group, Inc.'s Response, the State's Reply, and the remainder of the file herein. The motion should be GRANTED.

The State moves to quash GEO's subpoena to depose State of Washington Attorney General Robert Ferguson. The deposition is currently scheduled for August 29, 2018.

ORDER GRANTING PLAINTIFF THE STATE OF WASHINGTON'S MOTION FOR PROTECTIVE ORDER
QUASHING SUBPOENA FOR DEPOSITION OF ATTORNEY GENERAL ROBERT W. FERGUSON - 1

1 The proposed deponent, AG Ferguson, is not only a high-ranking government official,
2 but also is the head lawyer for the law department representing the plaintiff, the State of
3 Washington. Absent extraordinary circumstances, a party cannot depose the opponent's lawyer.
4 *DiLorenzo V. Costco Wholesale Corp.*, 243 F.R.D. 413, 415 (W.D.Wash.2007)(citing cases). No
5 such circumstances exist here.

6 Furthermore, district courts are vested with broad discretion to permit or deny discovery.
7 *See Laub v. U.S. Dept. of Interior*, 342 F.3d 1080, 1093 (9th Cir.2003). As a general rule, under
8 the so-called *Morgan* ("Apex") doctrine, high-ranking government officials are not subject to
9 deposition absent extraordinary circumstances. *U.S. v. Morgan*, 313 U.S. 409, 421-22 (1941);
10 *Warren v. Washington*, No. C11-5686 BHS/KLS, 2012 WL 2190788, at *1-2 (W.D.Wash.2012)
11 (citing multiple cases). The purpose of the *Morgan* doctrine is to protect officials' decision-
12 making process. *Id.*; *U.S. v. Sensient Colors, Inc.*, 649 F.Supp.2d 309, 316 (D.N.J. 2009).
13 Without such protection, individuals might be discouraged from public service. *Id.*

14 Courts first determine whether the *Morgan* doctrine should be extended to the particular
15 high-ranking government official, and if so, the burden shifts to the opposing party to show
16 extraordinary circumstances. *See United States v. Sensient Colors, Inc.*, 649 F.Supp.2d 309, 320
17 (D.N.J.2009). In addition to the proposed deponent's status a counsel to the plaintiff, AG
18 Ferguson is also protected by the *Morgan* doctrine as a high-ranking government official.

19 To show extraordinary circumstances, the party seeking the deposition must show: (1) the
20 official's testimony is necessary to obtain relevant information that is not available from another
21 source; (2) the official has first-hand information that cannot reasonably be obtained from other
22 sources; (3) the testimony is essential to the case at hand; (4) the deposition would not
23 significantly interfere with the ability of the official to perform his government duties; and (5)

1 the evidence sought is not available through less burdensome means or alternative sources.
2 *Warren* at *2 (citations omitted). Stated differently, the extraordinary circumstances test may be
3 met when high-ranking officials “have direct personal factual information pertaining to material
4 issues in an action,” and the “the information to be gained is not available through any other
5 sources.” *Boga v. City of Boston*, 489 F.3d 417, 423 (1st Cir.2007).

6 Applied here, the Court FINDS:

- 7 1. The State has standing to challenge the subpoena to depose AG Ferguson.
- 8 2. The Court should exercise its discretion to control discovery by granting the request
9 for protective relief pursuant to Fed. R. Civ. P. 26(c)(1).
- 10 3. AG Ferguson is a high-ranking official whose mental impressions and deliberative
11 processes merit protections as a lawyer heading the plaintiff’s legal team and under
12 the *Morgan* doctrine.
- 13 4. GEO has not made a sufficient showing of extraordinary circumstances under the
14 *Morgan* doctrine. AG Ferguson’s deposition is not essential to the merits of the claim
15 or counterclaims. AG Ferguson’s deposition is not necessary to obtain discovery that
16 GEO could obtain from third parties, with one exception, discovery as to AG
17 Ferguson’s personal motives for filing the case. However, such motives amount to the
18 work product and deliberative processes of counsel, and are not discoverable. .

19 The Court is also concerned with the proportionality of the discovery in this case under
20 Fed. R. Civ. P. 26(b)(1), but makes no ruling here in regard to proportionality.

21 THEREFORE, it is HEREBY ORDERED that Plaintiff the State of Washington’s
22 Motion to Quash Subpoena for Deposition of Robert Watson Ferguson (Dkt. 100) is GRANTED.
23 The subpoena is HEREBY QUASHED

1 IT IS SO ORDERED.

2 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
3 to any party appearing *pro se* at said party's last known address.

4 Dated this 27th day of August, 2018.

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7 ROBERT J. BRYAN
8 United States District Judge
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